
NO. 33191

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

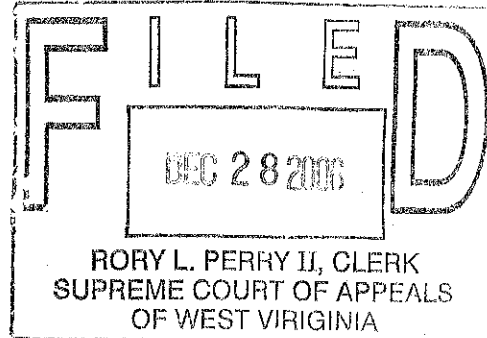
STATE OF WEST VIRGINIA,

Appellee,

v.

WADE C. DAVIS,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7269
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS	2
III. RESPONSE TO ASSIGNMENT OF ERROR	6
IV. ARGUMENT	7
A. APPELLANT WAIVED ANY CLAIM OF ERROR IN THE JURY INSTRUCTIONS WHEN HE STATED THAT HE WAS SATISFIED WITH THE COURT'S INSTRUCTIONS, THUS FORECLOSING APPELLATE REVIEW	7
1. The Standard of Review	8
2. Appellant's Acceptance of the Jury Instructions as Given by the Trial Court, and His Failure to Object to the Instructions in Question at Any Stage During the Trial Before the Jury Handed Down Its Verdict, Constituted a Waiver and Thus No Error Occurred That Is Reviewable by This Court	8
B. NO PLAIN ERROR OCCURRED AT THE TRIAL BECAUSE THE COURT'S INSTRUCTIONS WITH RESPECT TO THE ELEMENTS OF SECOND DEGREE MURDER WERE ADEQUATE FOR THE JURY TO CONVICT APPELLANT ON THAT COUNT	12
1. The Standard of Review	12
2. When the Jury Instructions Are Examined as a Whole, the Elements of Second Degree Murder Were Indeed Properly Outlined for the Jury to Convict Appellant of Said Charge	13
3. This Court Has Held That Intent to Kill Is Equivalent to Malice in Convicting Someone of Second Degree Murder; Therefore the Jury Instructions, When Taken as a Whole, Were Adequate for a Second Degree Murder Conviction in This Case	16
V. CONCLUSION	17

TABLE OF AUTHORITIES

	Page
CASES:	
<i>State v. Burgess</i> , 205 W. Va. 87, 516 S.E.2d 491 (1999)	16
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	13, 14, 15, 17
<i>State v. Hatfield</i> , 169 W. Va. 191, 286 S.E.2d 402 (1982)	16
<i>State v. Hertzog</i> , 55 W. Va. 74, 46 S.E. 792 (1904)	16
<i>State v. Jenkins</i> , 191 W. Va. 87, 443 S.E.2d 244 (1994)	16
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	8, 11
<i>State v. Morrison</i> , 49 W. Va. 210, 38 S.E. 481 (1901)	16
<i>State v. Scott</i> , 206 W. Va. 158, 522 S.E.2d 626 (1999)	16
<i>State v. Starkey</i> , 161 W. Va. 517, 244 S.E.2d 219 (1978)	16
<i>United States v. Lakich</i> , 23 F.3d 1203 (7th Cir. 1994)	9, 11
STATUTES:	
West Virginia Code § 61-2-1	1

NO. 33191

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

WADE C. DAVIS,

Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW

This is an appeal by Wade C. Davis (hereinafter "Appellant") from the December 10, 2004, judgment of the Circuit Court of Kanawha County (Stucky, J.), which sentenced him to a term of ten years in the state penitentiary upon his conviction by a jury of one count of second degree murder in violation of West Virginia Code § 61-2-1. On appeal, Appellant claims that the circuit court failed to adequately instruct the jury on the elements of second degree murder, which would amount to plain error denying Appellant a fair trial.

II.

STATEMENT OF FACTS

Versions of the events in this crime naturally vary. Some events are in rank dispute--mostly by Appellant. However, one thing is not in dispute. Appellant stabbed an unarmed 18-year-old boy four times with a knife and killed him.

The victim, Michael Lattea, died of a fatal stab wound to the chest delivered with such savagery and strength that Appellant was able to compress an eight-inch stab wound through the victim's ribs, muscle, both lungs, and the heart with a three- and a-half-inch bladed knife. The Appellant also stabbed the victim twice in the back of the head and another time in the chest. The fatal wound was inflicted on the upper left side of the victim's body.

According to Appellant, he managed to deliver these wounds with his right hand as he "laid face first on the pavement" and was being beaten by the unarmed victim as he straddled the Appellant's back. (Appellant's Brief at 3.)

* * * * *

In the late evening hours of March 17, 2003, at approximately 11:45 p.m., Wade C. Davis along with friends, Todd Robins and Matt Hensley, pulled up to the gas pumps at the Go-Mart in Sissonville, West Virginia, riding in a black pickup truck. A few minutes later, a red truck driven by Donald "Bubby" Shaffer along with Eddie Lattea and his teenage son, Michael Lattea (also referred to herein as "the victim"), pulled up to the gas pumps at the Go-Mart. Also, at the Go-Mart parking lot that night were three travelers on their way back to Flint, Michigan, from Hilton Head, South Carolina: Donna Brown, Timothy Edwards and Paul Grasso, all of whom testified at trial.

While Eddie Lattea headed to the night window to prepay, Donald Shaffer pumped gas. (Tr. vol. II, 51.) Michael Lattea was in front of the store talking with friends he had spotted. (*Id.*)

As Eddie Lattea approached the night window to pay for the gas, he heard Appellant yelling at no one in particular, "turn on the f---ing pumps on." (*Id.* at 51-52.) Eddie Lattea yelled to Appellant that because it was after hours gas purchases had to be prepaid. Appellant responded: "f--- you buddy. Who's talking to you." (*Id.*) Eddie Lattea testified that he asked Appellant what his problem was. (*Id.*) Appellant answered back, "I'll show you what my f---ing problem is." (*Id.*) The exchange was characterized by witness Paul Grasso as a "shouting match." (Tr. vol. II, 209.)

The confrontation became heated and escalated from there. According to the testimony of Donna Brown, Appellant then "threw the first punch" and both Appellant and Eddie Lattea "went down on the ground for just a minute." (Tr. vol. II, 20.) Ms. Brown testified that she thought the confrontation was over because both Appellant and Eddie Lattea got up and headed in "their own separate ways." (*Id.*) But Appellant was not finished. Ms. Brown testified that she "saw the other gentleman that took the first punch going back towards his pickup truck." (Tr. vol. II, 21.) Instead of retreating from the confrontation when he clearly had the opportunity, Appellant returned with a knife and started chasing Eddie Lattea (Tr. vol. II, 21, 132, 169, 209; Tr. vol. III, 207.) Eddie Lattea ran towards a darkened part of the lot by a dumpster. As Eddie Lattea ran, Appellant was in pursuit flailing the knife in an overhanded striking motion. (Tr. vol II, 133.) By this point the victim, Michael Lattea, had come to his father's defense and was now also being chased by Appellant. Witness Donna Brown testified "I saw that guy with the knife start running after the other two gentlemen, and he chased them into a dark parking lot." (Tr. vol. II, 21.) Both were headed towards the dumpster area of the lot. (Tr. vol. II, 53, 171-72.) Sometime during the chase, Appellant

fell but when he got up he continued the pursuit.¹ (Tr. vol. II, 54-55, 21-22.) Appellant then caught up to Eddie Lattea and stabbed him in the back. (*Id.* at 54.) Appellant then turned his attention towards the victim (Tr. vol. II, 55, 172). Eddie Lattea, in the meantime, was searching for a weapon to ward Appellant off of his son. (*Id.* at 55-56.) Eddie Lattea heard his son shout to Appellant "that's enough," after which Appellant inflicted the fatal wound. (*Id.* at 56.)

While Appellant was attacking Eddie Lattea and the victim, Donald Shaffer, their companion, had gotten into his truck. Shaffer testified that he started up his truck and tried to, in effect, herd Appellant away from his victims and interrupt the attack. (Tr. vol. II, 171.) When Shaffer's truck came at Appellant, he chased Eddie Lattea and the victim behind the dumpster to block the truck. Donald Shaffer testified that he thought he saw Appellant striking the victim with his fist, but later found out that Appellant was actually stabbing the victim in a striking motion. (Tr. vol. II, 172.) After stabbing Eddie Lattea and fatally wounding the victim, Appellant then turned his attention to Donald Shaffer. Appellant came to Shaffer's truck—which had stalled—and tried to open the truck door. The door opened slightly and Shaffer tried to pull the door back by pulling on the partially opened window glass. The door closed but the glass was broken. (*Id.* at 173, 276.) Appellant reached in through the broken window and flailed the knife at Shaffer. (*Id.* at 173.) Donald Shaffer then started his truck and drove to the other side of the lot. According to Donna Brown, the driver of the truck, Donald Shaffer, tried to chase down Appellant and his companions. According to Brown, one of Appellant's companions dived and rolled over to avoid being hit by Shaffer's truck.

¹Appellant testified that it was after this fall that the victim pounced on his back and started the attack from which the Appellant defended himself by stabbing the victim to death. (Tr. vol. IV, 48-53.) However, several witnesses testified that the Appellant immediately got back to his feet and chased his victims behind the dumpster. (See Statement of Facts above.)

(Tr. vol. II, 22.). Appellant then ran to the truck he arrived in along with his companions and they "squealed out of there." (Tr. vol. II, 23; *see* Tr. vol. II, 57.)

Michael Lattea was taken to the hospital where he died from a stab wound to the heart. Appellant suffered what appeared to be a stoved finger and a skinned knee according to the observations of Lt. Greg Young of the Kanawha County Sheriff's Department. (Tr. vol. II, 271-72.) No evidence or testimony at trial demonstrated that Appellant displayed any physical manifestations of the severe beating he claimed to have suffered at the hands of Michael and Eddie Lattea. (*See* Appellant's testimony at Tr. vol. IV, 33-74.) However, Appellant's skinned knee was consistent with witness testimony that he fell while he was chasing down his victims.

According to the medical examiner's testimony the victim was stabbed four times—twice in the chest and twice in the back of the scalp. (Tr. vol. III, 126.) The fatal wound entered the left side of the victim's chest under the nipple and went between the victim's ribs, penetrated both lungs and the heart. (Tr. vol. III, 132-34.) Although the knife used by Appellant to kill his victim was only three and a half inches long, the wound was inflicted with such force that it compressed bone, muscle, ribs, heart, and two lungs such that when the knife was removed the wound was more than double the length of the blade. (Tr. vol. III, 149-50.) The medical examiner explained that the knife compressed the victim's ribs and lungs four inches into his chest cavity. (*Id.*)

Appellant claimed in his testimony that he was attacked by the victim while he was on the ground after he had fallen. (Tr. vol. IV, 49-50.) He claimed to have inflicted all four wounds by stabbing backwards at the victim; yet, two of the wounds suffered by the victim were on the back of his head and the fatal wound was inflicted on the left side of the victim's body. (Tr. vol. III, 144-47; R. 699.) Appellant testified at trial that he had the knife in his right hand. (Tr. vol. IV, 43.)

The facts in this case reveal that Appellant was combative and using profanity immediately after he arrived at the Go-Mart. He was looking for a fight. Appellant approached Eddie Lattea and "threw the first punch." After Eddie Lattea began to walk away, Appellant returned to his truck, retrieved a knife, and chased after Eddie Lattea. The victim came to the defense of his father and Appellant chased him as well. As Eddie Lattea was trying to escape, Appellant stabbed him in the back. He turned to the victim and stabbed him four times, once with such savagery that he shoved the victim's lungs and rib bones four inches into his chest. Two of the wounds suffered by the victim were on the back of his scalp.² Appellant then tried to stab Donald Shaffer after he had already inflicted the fatal wound to his victim and stabbed Eddie Lattea.

Appellant now asks for a reversal of his conviction because the jury exhibited some confusion over the instructions. In the event that this Court should see fit to reverse Appellant's conviction, there is more than sufficient evidence to convict him again of second degree murder on a re-trial.

III.

RESPONSE TO ASSIGNMENT OF ERROR

Appellant's assignment of error is quoted below, followed by the State's response:

The trial court's failure to instruct the jury that intent to kill is an essential element of second degree murder is plain error as it greatly prejudiced Appellant because he claimed the killing was unintentional, and the erroneous instruction likely resulted in his conviction for that offense.

²The nature of the victim's scalp injuries support testimony that the Appellant was attacking with an over-the-shoulder motion while his victim ran.

State's Response:

A. Because Appellant failed to object to the jury instructions at any time before the verdict, and in fact stated that he was satisfied with the court's charge as given, he waived any claim of error in those instructions.

B. No plain error occurred at the trial because the court's instructions with respect to the elements of second degree murder were adequate for the jury to convict Appellant on that count.

1. When the jury instructions are examined as a whole, the elements of second degree murder were indeed properly outlined for the jury to convict Appellant on said charge.

2. This Court has held that intent to kill is equivalent to malice in convicting someone of second degree murder; therefore the jury instructions, when taken as a whole, were adequate for a second degree murder conviction in this case.

IV.

ARGUMENT

A. APPELLANT WAIVED ANY CLAIM OF ERROR IN THE JURY INSTRUCTIONS WHEN HE STATED THAT HE WAS SATISFIED WITH THE COURT'S INSTRUCTIONS, THUS FORECLOSING APPELLATE REVIEW.

Appellant contends that the trial court committed plain error by failing to instruct the jury properly regarding the elements of second degree murder, thus causing confusion with the jurors and denying him a fair trial when he was convicted of this offense. However, at no time before the jury handed down its verdict did Appellant's defense counsel object to these jury instructions, but in fact

stated that he was satisfied with the Court's instructions as given. In light of this, defense counsel waived any right for this Court to review this issue.

1. **The Standard of Review.**

To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. *A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.* By contrast, mere forfeiture of a right -- the failure to make timely assertion of the right -- does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."

Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (emphasis added).

2. **Appellant's Acceptance of the Jury Instructions as Given by the Trial Court, and His Failure to Object to the Instructions in Question at Any Stage During the Trial Before the Jury Handed Down Its Verdict, Constituted a Waiver and Thus No Error Occurred That Is Reviewable by This Court.**

Appellant contends that plain error occurred during his trial where the jury was confused with its instructions, and thus, his right to a fair trial and due process were denied as guaranteed by the Federal and State Constitutions (United States Constitution, Sixth and Fourteenth Amendments; West Virginia Constitution, Article III, §§ 10, 14). However, at no time during the trial did Appellant object to the instructions given to the jury before a verdict of guilty of second degree

murder was delivered. Appellant's failure to object to these jury instructions when he was given numerous opportunities to do so constituted a voluntary and knowing waiver. In *United States v. Lakich*, 23 F. 3d 1203, 1207 (7th Cir. 1994), it was held that "where there has been a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined." In *Lakich*, the defense counsel was given ample opportunities to object to the jury instructions regarding the definition of "entrapment" and failed to do so. Both parties explicitly agreed to these instructions, and the Court of Appeals held that the defendant waived any right to object to such instructions. *Id.* at 1207-08. This waiver in the case at bar, as in *Lakich*, established that there was no error committed by the trial court, and this Court need not inquire as to the effect of any deviation from the rule of law, if any occurred.

There were numerous opportunities for Appellant, through his defense counsel, to object to the instructions given to the jury as to the elements of second degree murder. On December 9, 2004, after both the prosecution and the defense had rested their case, there was a discussion held between the two parties and Judge Stucky regarding the final wording of the jury instructions. (Tr. vol. IV, 116.) During this discussion, defense counsel raised no objection to the court's proposed charge regarding the elements of the offenses, nor did he offer any alternative instruction for the elements of second degree murder. (R. vol. II, 1626; 12/9/04 Trial Excerpt at 17; Jury Instructions, R. 1452-1500.) The only change that defense counsel proposed was changing the term from "must" to "may" regarding the jury convicting Appellant of second degree murder if unanimously finding him guilty of said offense beyond a reasonable doubt, which the court granted. (*Id.*) At the conclusion of this discussion, Judge Stucky asked both parties on the record whether there was any more discussion on these instructions, and both stated that no further discussion was needed. (Tr.

vol. IV, 118.) Once both sides came to this agreement, the court retrieved the jurors, and Judge Stucky read the jury instructions to them, including the elements of second degree murder. (*Id.* at 119, 141.) At no time during Judge's Stucky's reading of the jury instructions did Appellant object. After Judge Stucky concluded reading the instructions with no objections by either party, closing arguments began. (Tr. vol. IV, 155.)

On three separate occasions during jury deliberations, the jurors came back with questions regarding the elements of murder. The first two questions were the following:

1. **We need a copy of the definitions for the different charges of murder.**
2. **In reference to our first question, can you please reference the definition of the degrees of murder?**

(Tr. vol. V, 3, 13; *see* Appellant Brief at A1, A-2.) In each of these instances, Judge Stucky stated that he would re-read the agreed-to jury instructions on the elements of first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter, and both parties voiced no objections to this method of answering the jurors' questions. (*Id.* at 3, 13-15.) Additionally, once Judge Stucky concluded reading these instructions to the jurors in response to their questions, there was no objection made at any time by Appellant. (Tr. vol. V, 13, 23.)

After the jurors reconvened at this point, they submitted yet another question for the court. This question went specifically to the elements of second degree murder and voluntary manslaughter. The jurors' third question was the following:

Can you please verify the following: Is second degree with malice and unlawful [and] without intent and voluntary manslaughter without malice and with intent in the heat of passion? Please verify the with and without intent [sic]. Thanks.

(Tr. vol. V, 23, *see* at Appellant's Brief, A-3.) In response to this question, Judge Stucky stated that he would re-read the jury instructions regarding the definitions of second degree murder and voluntary manslaughter. In response to this approach to answering the jurors' question, Appellant's defense counsel specifically stated that he had no problem with that method of answering the jury inquiry. (Tr. vol. V, 23-24.) Yet again, after Judge Stucky concluded this answering of the jurors' question, Appellant's defense counsel voiced no objection. (Tr. vol. V, 28.) During each instance where Judge Stucky re-read the definitions of these criminal offenses, Appellant's defense counsel had opportunities not only to object but also to provide an alternative definition for second degree murder, yet failed to do so. The jury then deliberated and handed down a verdict of guilty of murder of the second degree. (*Id.* at 30.)

Appellant had numerous opportunities to object to these jury instructions, yet his defense counsel repeatedly took no action. Appellant even admits that his defense counsel had opportunities to object to the jury instructions as to the elements of second degree murder and voluntary manslaughter but repeatedly chose not to make them. (*See* Appellant's Brief at 10, 12.)

This Court has held that when a defendant agrees to jury instructions and does not object to them, it is deemed a knowing waiver. Once such a waiver occurs, no error exists and the Court need not inquire any further on the matter. *Miller*, 194 W. Va. at 14, 459 S.E.2d at 129 (citing *United States v. Olano* 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993)). Thus, Appellant's failure to object to these jury instructions with respect to the elements of second degree murder and voluntary manslaughter when his defense counsel had repeated opportunities to do so, constituted a knowing waiver. This waiver in the case at bar, as in *Lakich*, established that there was no error committed by the trial court, and this Court need not inquire as to the effect of any alleged deviation from the

rule of law, if any occurred. Appellant's knowing waiver established that there was no error in the jury instructions, and forecloses appellate review by this Court.

B. NO PLAIN ERROR OCCURRED AT THE TRIAL BECAUSE THE COURT'S INSTRUCTIONS WITH RESPECT TO THE ELEMENTS OF SECOND DEGREE MURDER WERE ADEQUATE FOR THE JURY TO CONVICT APPELLANT ON THAT COUNT.

Even if this Court should find that Appellant did not waive this issue, because Appellant failed to object at trial to the court's instructions to the jury, the only way this Court could grant relief is if it finds plain error. There was no error, plain or otherwise, in the trial court's instructions.

Appellant asserts that plain error occurred at the trial due to improper instructions given to the jury which caused confusion with respect to the elements of second degree murder and voluntary manslaughter. In particular, Appellant argues that the element of intent was omitted from the definition of second degree murder which caused plain error when the jurors convicted him of that charge. However, when the jury instructions are examined as a whole, it is evident that no elements were omitted and no plain error occurred. The element of intent was indeed outlined with respect to second degree murder in the instructions as a whole. Further, this Court's precedent has established that the elements of intent and malice are interchangeable for purposes of defining second degree murder in order to convict a person of said offense.

1. The Standard of Review.

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction,

and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. Pt. 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

2. **When the Jury Instructions Are Examined as a Whole, the Elements of Second Degree Murder Were Indeed Properly Outlined for the Jury to Convict Appellant of Said Charge.**

Although the jury instructions did not contain the element of intent in the definition of second degree murder,³ when taken as a whole, this element was contained in the instructions with respect to this offense. This element of intent was included in the instructions for second degree murder in the definition of malice. The definition of second degree murder according to the jury instructions was the following:

Murder in the second degree is committed when any person kills another person, unlawfully, and maliciously, but without deliberation or premeditation.

(Tr. vol. IV, 140; Tr. vol. V, 9, 19; R. 1474.)

The jury instructions dealing with the definition of malice stated the following:

Malice is an essential element of murder in the first degree and *murder in the second degree*.

The term "malice" as used in these instructions, is defined as a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which may be inferred from the acts committed or the words spoken.

The word "malice" is used in the technical sense and includes not only anger, hatred and revenge, but every unlawful and unjustifiable motive.

³The element of intent was not read to the jurors when Judge Stucky re-read the instructions regarding the definition of second degree murder. (Tr. vol. V, 9, 19 and 25-26.)

Malice is not confined to ill will to any one or more particular persons, but is intended to denote an action flowing from any wicked or corrupt motive, done with an evil mind and purpose and *wrongful intention*, where the act has been attended with circumstances showing such a reckless disregard for human life as to necessarily include a formal design against a life of another. Therefore, malice may be inferred from any willful, deliberate and cruel act against another, however sudden.

It is not necessary that malice must exist for any particular length of time, and it may first come into existence at the time of the act or at any previous time.

Malice is a species of criminal intent, and must be shown to exist against the deceased in a homicide case.

It is reasonable to infer that a person ordinarily intends to do that which he does or which is the natural or probable consequences of his knowing acts.

(Tr. vol. IV, 134-136; R. 1466; emphasis added.) Accordingly, the element of intent was included in the definition of second degree murder when also examining the definition of malice in the jury instructions.

This Court has held that jury instructions are to be reviewed by determining whether the charge reviewed as a whole, sufficiently instructed the jury so that they understand the issues involved and are not misled by the law. Jury instructions cannot be dissected in determining their accuracy. *Guthrie, supra*. When taken as a whole, there is no doubt that the definition of second degree murder in the court's charge did indeed contain the element of intent. The trial court stated that intent is intertwined with and is an essential element of malice. Additionally, the court instructed the jury that malice is an element of both first and second degree murder.

The State concedes that the definition of second degree murder in the jury instructions at issue could have contained the term "intent" within its elements such as is the case in the West

Virginia Supreme Court of Appeals' Proposed Jury Instructions.⁴ However, when the *Guthrie* standard is applied and the entire jury instructions are examined, it is clear that all of the elements of second degree murder were provided to the jurors and no plain error occurred.

This Court also held in *Guthrie* that deference is to be given to the trial court's discretion concerning specific wording of instructions. The precise extent and character of any specific instruction is to be reviewed only for an abuse of discretion. *Id.* Appellant contends that the jury in this case expressed some confusion as to the definitions of the degrees of unlawful killing; in particular, regarding the definitions of second degree murder and voluntary manslaughter. Yet, when the standard as set forth in *Guthrie* is applied, it is evident that there was no abuse of discretion by the trial court. The full jury instructions were read to the jury once; the definitions of each degree of unlawful killing under the first count of the indictment were read twice more; and the definitions of second degree murder and voluntarily manslaughter were read to the jurors yet a third time. In light of this, and the fact that the element of intent was included in the definition of second degree murder through the definition of malice when examining the instructions as a whole, there was no abuse of discretion and no plain error by the trial court.

⁴The West Virginia Supreme Court of Appeals' Proposed Jury Instructions for Unlawful Killing defines "murder in the second degree" as "the unlawful intentional killing of another person with malice but without deliberation or premeditation."

3. **This Court Has Held That Intent to Kill Is Equivalent to Malice in Convicting Someone of Second Degree Murder; Therefore the Jury Instructions, When Taken as a Whole, Were Adequate for a Second Degree Murder Conviction in This Case.**

The fact that the element of intent was not explicitly stated in the definition of second degree murder in the jury instructions did not amount to plain error and the denial of a fair trial in this case. The definition of malice in the jury instructions was adequate for a conviction of second degree murder due to it being intertwined with the element of intent. Historically, this Court has held that intent to kill was not an element for a conviction of second degree murder. Syl. Pt. 3, *State v. Morrison*, 49 W. Va. 210, 38 S.E. 481 (1901); *State v. Hertzog*, 55 W. Va. 74, 79-80, 46 S.E. 792, 794 (1904). While this may no longer be true, this Court has held in various cases that intent and malice are equivalent for the purpose of a conviction for second degree murder. See *State v. Starkey*, 161 W. Va. 517, 522, 244 S.E.2d 219, 223 (1978) (holding that malice is essentially a form of criminal intent in both first and second degree murder); *State v. Hatfield*, 169 W. Va. 191, 198, 286 S.E.2d 402, 407 (1982) (holding that malice is often used as a substitute for intent to kill or an intentional killing); *State v. Jenkins*, 191 W. Va. 87, 92, 443 S.E.2d 244, 249 (1994) (holding that the intent to kill or malice is an essential element of second degree murder); *State v. Burgess*, 205 W. Va. 87, 89, 516 S.E.2d 491, 493 (1999) (citing *Starkey*, *supra*); and *State v. Scott*, 206 W. Va. 158, 164, 522 S.E.2d 626, 632 (1999) (holding that prosecution was required to prove malice in order to convict defendant of second degree murder).

In light of these holdings, it is the case that an explicit stating of the term "intent" in the definition of second degree murder is not an essential element in the instructions to a jury with respect to that offense, so long as the definition of malice is present. The jury instructions in this

case, when read as a whole rather than dissected, as *Guthrie, supra*, dictates, were indeed adequate due to the fact that intent was outlined in the definition of malice. The instructions did not constitute plain error, and Appellant was not denied a fair trial or due process. Accordingly, Appellant's conviction should be affirmed.

V.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7269
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 28th day of December, 2006, addressed as follows:

Crystal L. Walden, Esq.
Assistant Public Defender
Office of the Public Defender
Kanawha County
P.O. Box 2827
Charleston, WV 25330



R. CHRISTOPHER SMITH